No. 386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

OLUF BORUP, *et al.*, seamen on board the American Whale Factory Ship "ULYSSES",

Petitioners,

against

American Whale Factory Ship "ULYSSES", her engines, boilers, tackle, apparel, furniture, etc., and WESTERN OPERATING CORPORATION, Owner, and H. M. MIKKELSEN, Master,

Respondents.

PETITION AND BRIEF FOR WRIT OF CERTIORARI

LYMAN STANSKY,
Proctor for Petitioners.

HERBERT LEBOVICI,
Proctor for Petitioners.

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PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

The petition of the petitioners, Oluf Borup, et al., respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This petition for certiorari is concerned with the payment of seamen's wages.

The Whale Factory Ship ULYSSES in April of 1940 was returning to Norway upon the conclusion of a season's whaling operations in the Antarctic, when Norway was invaded by Germany (418).* The ULYSSES, a United States

* References are to folios unless otherwise indicated.

owned and registered vessel, was thus forbidden by the terms of the Presidential Proclamation under the Neutrality Act, from returning to Norway (4 Fed. Reg. 1939). The ULYSSES then proceeded to New Orleans.

The ULYSSES, at New Orleans (418), then discharged its cargo of whale oil taken during the season, and proceeded to New York, where she arrived on May 10, 1940 (418). On June 29, the owners having decided to convert her to a bulk oil carrier, the ULYSSES put into Robbins dry-dock at Brooklyn, New York, where the conversion was made (421).

The respondents, not having the money with which to pay the seamen their wages (311-312), failed to discharge them (Record, p. 405), and, except for about 96 of the 250, who at different times took jobs on other vessels going foreign without receiving their wages in full (425), the members of the crew remained on board obedient to the master's orders (471). On July 1, 1940, they filed a libel in form in personam and in rem, but process was issued and served only in personam (2). Meanwhile, the crew remained on board, obedient to the master's orders and performing services (471).

In July, the seamen made an application by motion to the District Court for an order to compel the respondents to pay them an advance against the wages that were indisputably due (278-282). In an affidavit sworn to on *July 15, 1940,* and signed by the vice-president of the respondent, Western Operating Corporation, Mr. Blake, who was likewise proctor for the respondents, the respondents stated to the Court as follows (306):

> "In the meantime the libelants are still on the payroll and their wages are accruing, * * *."

On September 1, 1940, they were ordered by the chief mate to cease further work (473). On October 11, 1940, the ship was arrested pursuant to process in rem (8).

The relevant documents forming the petitioners' contract of shipment provided with regard to the duration of the voyage that it was (Libelants' Exhibit I)

> "* * * from Sandefjord on a whaling trip to the Antarctic and thence to Sandefjord or port of discharge."

Another provision of their agreement provided (Libelants' Exhibit II)

> "Wages run from and including the day of entering the service *until discharge occurs;"* (italics ours).

The principal question presented below and upon this application for certiorari is, when did the seamen's wages stop accruing.

The District Court held that the seamen's right to wages terminated on May 15, 1940, because on or about that date, the voyage, as a "whaling voyage" terminated (948-949). The Circuit Court of Appeals' decision, affirmed that decree, basing its decision upon the theory of frustration of adventure by the Presidential Proclamation of April 10, 1940.

It is petitioners' contention that this holding was erroneous in that the frustration or impossibility of performance related only to the question of the vessel's return to

Norway. However, the express provision of the seamen's contract provided for an alternative and possible method of performance, *i.e.*, discharge at the Port of New York or elsewhere (Libelants' Exhibit I). Such being the case, it was required of the respondents, both under the provisions of the seamen's contract which provided that wages should continue until they were discharged, as well as under relevant provisions of the laws of the United States, that they perform their contract with the seamen in the alternative method still possible and required in the contract and that was to discharge the seamen and pay them their wages up to the time of their discharge. In fact, the petitioners were never discharged by the respondents, but, inasmuch as the petitioners arrested the vessel pursuant to process in rem on October 11, 1940, it will be conceded for purposes of this appeal, that the right to wages terminated as of October 11, 1940.

One further question is presented upon this application, that of the petitioners' repatriation. Their contract provided (447):

> "The employed may be signed off at any place whatever according to the wishes of the company. In case of signing off the employed is entitled to a free passage and wages until he reaches the place of signing on."

Both the District and Circuit Courts below denied repatriation to those seamen who, while awaiting adjudication of their right to it, or resumption of normal communications between the United States and Norway, "shipped foreign"; that is, took other jobs awaiting the oppor-

tunity to be repatriated. It is our contention that this qualification of their right to be repatriated is novel and unwarranted.

Questions Presented.

1. Were the respondents required to discharge the petitioners and pay them their wages to the date of their discharge, where the contract of employment provided for payment of wages to the date of their discharge?

2. Where alternative methods of performance were provided for in the contract of employement, *i.e.*, return to Sandefjord or port of discharge, and one of the alternatives, that of return to Sandefjord became impossible of performance by reason of the Presidential Proclamation of Neutrality of April 10, 1940, were the respondents not required to perform, pursuant to the remaining alternative, that is, to have discharged them elsewhere and to have paid them their wages to the date of their discharge?

3. Where the respondents have judicially admitted that wages will continue to accrue, and where the seamen have been held obedient to the masters orders, and where the conduct of the respondents has led the seamen to believe that wages were continuing to accrue and that services performed were earning wages,

   (a) are the respondents not bound by their judicial admission of liability; and

(b) are they not estopped to deny the claim for wages, which their conduct had led the seamen to believe, were continuing to accrue?

4. Where the contract of employment provided for free passage to the place of signing on (repatriation), should this free transportation or the reasonable value thereof be denied to those petitioners, who, pending the resumption of normal communications between the United States and Norway, shipped foreign.

B.

Reasons Relied Upon for the Allowance of the Writ.

1. It has been the universal holding, save for a few exceptions not here applicable, that seamen are entitled to be paid their wages until the date of their discharge. Such was also the provision of their contract and so, too, it is contended, is the legislative policy of our Government as enunciated in our statutes. The holding of the Circuit Court below is in conflict with these well established principles of maritime law. It is further in conflict with the decision of the United States Circuit Court for the Fourth Circuit in the case of the *Sonderborg*, 47 Fed. (2d) 723, 726 (1931), in this respect, as well as with the decision in the case of the *Prahova*, 38 Fed. Sup. 418, 426 (D. C. S. D., Cal., 1941). It is likewise in contravention of the General Maritime Law, as established by the specific provi-

sions of the maritime laws of practically all nations, which laws universally require that seamen be paid to the time of their discharge. *Title 46 U. S. C. A.*, Sections 596 and 597, 641-646; England*—*Laws of England,* Volume 26, Shipping & Navigation, Part 3, p. 47, Act of 1880, Sec. 73; Denmark—*International Labor Office Legislative Series,* Den. 2, p. 3; Norway—*Collection of Norwegian Laws &c.,* published for use of the Legations and Consulates, p. 315; Sweden—*Merchant Seaman's Law,* reprinted from Statute Book of Legations and Consulates, p. 265; Finland—*International Labor Office Legislative Series,* Fin. 1, p. 4; Panama—*Consular Tariff Decree No. 71,* Article 1222.

2. The effect of the decision of the Circuit Court, that a seaman's contract may terminate without his knowledge, and, in fact, despite the express promise of the vessel to the contrary, may have serious consequences for both the seamen and the maritime world. It, in effect, forces the seaman to decide at his own risk, whether or not his contract may have terminated, despite the contract's express provision for continuation until discharge and despite the express promise of the respondents. As a corollary, it may in the future permit malicious masters to log as deserters seamen, who, in all honesty and good faith made the determination that their contract had ended, with a consequent forfeiture and withholding of pay.

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* Text of all foreign statutes set forth in Appendix.

3. The holding of the Circuit Court is in conflict with the universal holdings of the Federal and State Courts to the effect that where a contract provides that one of two alternatives shall be performed by the promissor, the fact that one alternative is frustrated, or becomes impossible of performance, does not excuse the promissor from performing that which remains possible. *Yankton Sioux Tribe of Indians* v. *United States,* 272 U. S. 351, 358; *P. N. Gray & Co., Inc.* v. *Cavalliotis* (E. D. N. Y.), 276 Fed. 565, 571; *Irvine* v. *Postal Telegraph Cable Co.* (Cal.), 173 Pac. 487, 488; *Beckwith* v. *Sheldon* (Cal.), 145 Pac. 97, 99; *Edgar G. Acker, Inc.* v. *Rittenberg, et al.* (Mass.), 152 N. E. 87, 88; *Drake* v. *White,* 117 Mass. 10, 13; *Stephens* v. *Webb,* 173 Eng. Rep. 27, 28; *Da Costa* v. *Davis,* 126 Eng. Rep. 882, 883; *Trotter* (4th Ed.) *"Law of Contracts During and After War"*, p. 129; *Williston on Contracts* (Revised Ed.), Vol. 6, Section 1961.

4. The Circuit Court, in failing to hold that the respondents' admission of liability was binding upon them, and continued their liability for wages beyond the date fixed by the District Court, departed from those decisions of our Federal Courts which held that the courts will leave the parties where their admissions find them. *National Steamship Co.* v. *Tugman,* 143 U. S. 28, 31, 32; *John E. Garman, etc.* v. *U. S.,* 34 Ct. Cl. 237, 242; *Oscanyan* v. *Arms Co.,* 103 U. S. 261, 263; *L. P. Larson Co.* v. *William Wrigley, Jr. Co.,* 253 Fed. 914, 918 (C. C. A. 7th)

1918; *Wigmore on Evidence* (Third Ed.), Vol. 9, Section 2590.

5. Repatriation has been a long well established right of seamen, both foreign and American. *Brunent* v. *Taber* (D. C., Mass.), 1854, Fed. Cas. 2054, p. 481; *Antone* v. *Hicks* (D. C., Mass.), 1874, Fed. Cas. 493, p. 1061; *The Mary Belle Roberts* (D. C., Cal.), 1875, Fed. Cas. 9200, p. 961; *Jenkins, et al.* v. *U. S. Emergency Fleet Corp.* (D. C., Wash.), 1920, 268 Fed. 870, 871; *Gerber* v. *Spencer* (C. C. A. 9th), 1922, 278 Fed. 886, 891. In addition, in the instant case, the employment contract specifically provided for repatriation (447). The decision of the Circuit Court below, which qualified this right by denying it to those seamen who shipped foreign, pending the resumption of normal communications between the United States and Norway, is a qualification on the right of repatriation, new to the Maritime Law. This qualification seriously affects the rights of merchant seamen of the United Nations, including the United States.

WHEREFORE, the petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify, and to send to this Court for its review and determination on a day to be therein named, a full and complete transcript of the record of all the proceedings in the case; and that the said judgment of the Circuit

Court of Appeals for the Second Circuit may be reversed by this honorable Court and that the petitioners may have such other and further relief in the premises as to this honorable Court may seem just, and

YOUR PETITIONERS WILL FOREVER PRAY.

Respectfully submitted,

LYMAN STANSKY,
Proctor for Petitioners.

HERBERT LEBOVICI,
Proctor for Petitioners.

IN THE

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American Whale Factory Ship "ULYSSES", her engines, boilers, tackle, apparel, furniture, etc., and WESTERN OPERATING CORPORATION, Owner, and H. M. MIKKELSEN, Master,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinions of the Courts Below.

The opinion of the District Court was not officially reported. It is contained between pages 310 and 327 of the record (928-981).

The opinion of the Circuit Court of Appeals, dated July 31, 1942, is reported in Fed. 2d , and is attached to the record, certified by the Circuit Court to this Court.

II.

Jurisdiction.

The jurisdiction of this honorable Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Section 1; 28 U. S. C. A. 347(a).

III.

Statement of the Case.

In September of 1939, at Sandefjord, Norway, the petitioners, Norwegian seamen for the most part, joined the service of the United States owned and registered whaling ship ULYSSES for a whaling voyage during the season of December, 1939 to March, 1940 (414). Thereafter, the ULYSSES proceeded to the Antarctic, putting in en route into St. Helena Bay, West Africa, for the purpose of fueling the killer boats (416). In doing so, the ULYSSES struck bottom and sustained damage to her hull which necessitated her proceeding to Durban, Africa, for dry-docking and effectuation of temporary repairs (416). By reason of the delay thus occasioned, the ULYSSES did not reach the whaling grounds until three weeks after the commencement of the official season for whaling in the Antarctic, which began on December 8, 1939. The season terminated on March 7, 1940 (416-417).

Upon completion of the season, having taken 62,500 (426) of the 101,000 barrels that it was anticipated by agreement between the parties the ULYSSES would take over the full season (425), the ULYSSES commenced her re-

turn voyage to Norway (417). On the way back, the military invasion of Norway by Nazi Germany occurred, and the ULYSSES was forbidden by the terms of the Presidential Proclamation under the Neutrality Act to return to Norway (4 Fed. Reg. 1939). The ULYSSES' American owners then ordered her to change her course for New Orleans (418). At New Orleans, a portion of the oil taken was discharged. Another portion, theretofore transferred from the ULYSSES to an oil tanker, was discharged at Carteret, New Jersey (462).

On June 29, without previous advice of any kind to the crew, the ULYSSES was placed in Robbins Dry Dock, where work was begun to convert her into a general bulk oil carrier (855-856).

Meanwhile, with exceptions to be hereinafter stated, the petitioners continued to work on Board the ULYSSES after her arrival at New York on May 10 (418), both before and after the commencement of the conversion of the vessel to a bulk oil carrier (574-575, 593, 594, 629, 671, 672, 698). Wages, in the meantime, save for allotments and disproportionately meager advances (424-425), continued to accumulate (306).

September 19, the date of the opening of hearings before the Special Commissioner, found the petitioners, for the most part, unpaid for a year's efforts at highly skilled endeavor.

Approximately 154 of the original 250 petitioners then still remained on board, the others having shipped foreign on other vessels or been placed ashore for hospital treatment (425), their pay still undetermined.

The record clearly shows that after the vessel arrived in New York on May 10, 1940, the petitioners continued

to do such work aboard the vessel through May, June, July and August of 1940, as they were ordered to do (471). It is undoubtedly true that the services of the petitioners during this period were neither of the precise nature as had been anticipated when they first joined the vessel, nor were they in the aggregate as arduous or as regular as might have been the case had the vessel been in the pursuit of a regular voyage, but, in any event, the record clearly shows that they were substantial (573-575, 593-596, 629-630, 670-672, 688-691, 692-693).

The record also shows that as late as August 12, 1940, the master specifically threatened that anyone failing to obey orders and to keep up his work would suffer deductions from pay (871-874). The record likewise shows specific projects assigned to and performed by the petitioners during the months of June, July and August; thus, breaking asphalt on cabin deck forward (661-663), scraping of rust and painting in chain locker (665), shifting of deck stores from lower fore peak to deck above (665), scraping, oiling and painting of cabin deck (669, 681-682), washing super structure in preparation for painting (671), painting outside of ship (679), scraping, washing, and painting of storerooms forward (679), carrying grenades from tank deck to main deck (681-682), working on lifeboats (684), washing, scraping, and painting pump and washrooms (681).

It further appears that in July, after the institution of this action, the petitioners made an application to the District Court for an order that would compel the respondents there to make some advance against the undisputably large sum of wages that was then due each of them (3). In opposing that application, respondents submitted an affi-

davit to the Court, sworn to by their proctor and by its vice-president, which stated as follows (306):

> "In the meantime the libelants are still on the payroll and their wages are accruing. * * *"

On September 1, the order finally was given by the chief mate to the effect that no one was to work *any more* (473).

The relevant provisions of their contract provided that (Libelants' Exhibit I):

> "2. The engagement is[1]
>
> a. For the ship's voyage from Sandefjord on a whaling trip to the Antarctic and thence to Sandefjord or port of discharge;
>
> b. For a period of one season; and
>
> c. Until signing off, which can only take place at Sandefjord.
>
> [1] The items not agreed upon to be deleted."

Their contract also provided (Libelant's Exhibit II):

> "1. Wages run from and including the day of entering the service until discharge occurs."

Another provision was (446):

> "Sec. 5"
>
> "War Risk Addition"
>
> "If in consequence of the state of war, agreements are concluded with organizations respecting war risk additions for officers and crews in the Norwegian Merchantile Marine, such agreements shall, in so far as they relate to wages, become similarly applicable to the officers and crews in equivalent wage-classes on the whaling fleet."

Also, it was provided (448):

> "7. If required by the manager and unless personal or other reasons of exceptional importance dictate to the contrary the men are obliged to over-winter in any foreign port. For such over-wintering the crews shall receive 50% addition to their wages. The men who over-winter are bound to serve next season at the same rate of pay and bonus as for the men in corresponding positions engaged at home. Time is reckoned from the date the vessel in question arrives at the place of laying-up until the day the next season's expedition arrives there or the employed leaves the place of laying-up in order to join the next season's expedition."

The wages to be paid consisted of a combination of

1. basic wages of so much per month (Exhibit I);
2. share bonus of so many Norwegian cents per barrel of the catch (Exhibit I); and
3. sliding scale bonus, depending on the average scale price of oil taken by all whaling expeditions mentioned in a pertinent agreement (Exhibit II, 47-55).

The vital question in the courts below, decided adversely to the petitioners, has been whether wages were payable after May 15, or not. In the event that the petitioners are correct—that wages are due them after May 15—the wages they are seeking include the following items:

1. Basic wages from May 15, 1940 to October 11, 1940;
2. Additional war bonus after July 1, 1940 to October 11, 1940;
3. Wage allowance for over-wintering.

In addition, there has been a dispute between the parties as to the disposition of their claim under their contract for repatriation, a question that will be discussed under a separate heading in the brief.

IV.

Proceedings Below.

The trial court denied wages to the petitioners, which wages were earned after the 15th day of May, 1940, upon the ground that the venture for which they had been employed, that is, the "whaling voyage", had terminated on or about May 15, 1940.

The Circuit Court of Appeals affirmed the decree of the District Court, upon the ground that the Presidential Proclamation of Neutrality of April 10, 1940, had "frustrated" the adventure so as to excuse the payment of wages after May 15, 1940.

Both Courts denied repatriation to those seamen who shipped foreign at any time, pending their opportunity to be repatriated, upon the ground that by the act of shipping foreign they terminated their right to repatriation.

V.

Specifications of Errors.

1. The Circuit Court erred in holding that the petitioners were not entitled to a discharge and to their wages up to the time of discharge.

2. The Circuit Court erred in holding that the Presidential Proclamation of April 10, 1940, excused, because of im-

possibility of performance or frustration, payment to the petitioners of wages beyond May 15, 1940.

3. The Circuit Court erred in failing to hold that the respondents were required to perform pursuant to the alternative method provided for in the contract.

4. The Circuit Court erred in failing to hold that the respondents were bound by their judicial admission of liability made on July 15, 1940.

5. The Circuit Court erred in failing to hold that the respondents were estopped by their conduct to deny that wages continued to accrue after May 15, 1940.

6. The Circuit Court erred in denying repatriation to those seamen who shipped foreign from the United States.

VI.

ARGUMENT

Summary of Argument.

POINT A. The petitioners, under the provisions of their contract, the laws of the United States, and the uniform provisions of the General Maritime Law, were entitled to a discharge and to wages until the time of their discharge.

POINT B. The Neutrality Proclamation of April 10, 1940, did not so frustrate the adventure as to deny the petitioners' claim for wages beyond May 15, 1940, and until their discharge.

POINT C. The respondents are bound by their admission of liability, and are estopped to deny petitioners' claim for wages beyond May 15, 1940.

POINT D. The petitioners did not lose their right to repatriation by shipping foreign, but, at the worst, their right to repatriation was suspended during the war.

POINT E. The opinions below are contrary to, and in conflict with, prior Federal and State Court decisions and are of serious consequence to the maritime world at the present time.

POINT A.

The petitioners, under the provisions of their contract, the laws of the United States, and the uniform provisions of the General Maritime Law, were entitled to a discharge and to wages until the time of their discharge.

The petitioners' contract specifically provided for the receipt by them of a discharge and wages until such discharge. The employment contract provided (Libelant's Exhibit II):

> "Wages run from and including the day of entering the service *until discharge occurs.** * *" (italics ours).

The decision of the Circuit Court, that petitioners were not necessarily entitled to a discharge, is in direct contravention of this provision of their contract. Furthermore, seamen always have been, apart from any express contractual obligation, entitled to a discharge upon the termination of their service, and it has been the receipt of this discharge certificate that marked the termination of their service. The statutes of the United States contemplated the execution of such a document to the seamen.

These statutes also make specific and detailed provision for the method of terminating a seamen's service. *Title 46 U. S. C. A., Sections 596, 597, 641-646.*

A reading of these sections clearly evinces the legislative intention of the United States that seamen should receive a discharge and, further, that they should receive their wages until the receipt of such discharge. These statutes, however, are but codifications of the decisions of the Admiralty Courts of this Country from the earliest times, *The Sonderborg,* 47 Fed. (2d) 723, 726 (C. C. A. 4th) 1931; *The Prahova,* 38 Fed. Supp. 418, 426 (D. C. S. D. Cal.) 1941; *Tarleton* v. *Mallory,* Fed. Cas. No. 13,753, p. 701, 1878; *Brown* v. *Lull,* Fed. Cas. No. 2018, p. 407, 1836; see also *Palace Shipping Company* v. *Caine* (House of Lords 1907) 9 Ann. Cas. 526, 527, as well as of the General Maritime Law, as it is expressed in the statutes of the various nations. (See reference to Laws of other Nations, at p. 7 of Petition annexed.) The language of these decisions, that wages continue until discharge, is unmistakable.

Thus, in the *Sonderborg* case, *supra,* it is stated as follows, page 726:

> "The contract continued, and their right to pay continued until their final discharge."

And in the *Prahova* case, *supra,* the following appears at page 426:

> "The libelant was laid off on January 3, 1941. Under Roumanian Law, referred to, he could thus be penalized for disobedience. Lege pentru Organizarea Marinei Comerciale, secs. 37, 38. On January 25, 1941, when the 'Prahova' ceased to fly the Roumanian flag, the seaman became entitled to his discharge, under American law. He has not been discharged

> even now. It follows that the seaman is entitled to his discharge and to the wages which have been due since that date, at the original rate of $52 per month, without penalty. 46 U. S. C. A. Section 596."

The rule of the above mentioned cases and statutes of various nations is well found in fact and in established maritime practice. Both the seamen and the masters or owners have always looked upon the act of discharge as terminating the seamen's obligation to remain with, and in the service of, the vessel, and likewise terminating the owner's obligation for further wages.

Impossibility or frustration, which prevents complete performance of a contract, where established, merely gives the master or the owner the right to discharge the seamen. It is respectfully submitted that until the decision in the instant case, it has never been held that frustration or impossibility warranted the cessation of further wages prior to actual discharge. See *Tarleton* v. *Mallory,* Fed. Cas. No. 13,753, p. 701; *The Prahova,* 38 Fed. Sup. 418, 426 (D. C. S. D. Cal.) 1941.

POINT B.

The Neutrality Proclamation of April 10, 1940, did not so frustrate the adventure as to deny the petitioners' claim for wages beyond May 15, 1940, and until their discharge.

The principal ground of the Circuit Court's decision was its holding that the Presidential Proclamation of April 10 (4 Fed. Reg. 1939) "frustrated" the contract, and thereby prevented its performance which, the Court

held, required the seamen to be paid wages until discharged in Norway.

However, the express alternative to returning the seamen to Norway, provided for in their contract, was that they might be discharged elsewhere (Libelant's Exhibit II). The Court held that this provision in the contract was a mere option to the respondents, and not a requirement, in the alternative.

This theory, upon which the Circuit Court rested its decision, was not anticipated by either side, and was, therefore, briefed by neither. In point of fact, however, it had been the well established law, until the holding of the Circuit Court, that where one of alternative methods of performing a contract was frustrated or made impossible, then the performance of the remaining alternative became obligatory upon the promissor, even though the alternative was at his option. *Yankton Sioux Tribe of Indians* v. *U. S.*, 272 U. S. 351, 358; *P. N. Gray & Co., Inc.* v. *Cavaliotis* (E. D. N. Y.), 276 Fed. 565, 571; *Irvine* v. *Postal Telegraph Cable Co.* (Cal.) 173 Pac. 487, 488; *Beckwith* v. *Sheldon* (Cal.) 145 Pac. 97, 99; *Edgar G. Acker, Inc.* v. *Rittenberg, et al.* (Mass.), 152 N. E. 87, 88; *Drake* v. *White,* 117 Mass. 10, 13; *Stephens* v. *Webb,* 173 Eng. Rep. 27, 28; *Da Costa* v. *Davis,* 126 Eng. Rep. 882, 883; *Williston on Contracts* (Revised Ed.), Vol. 6, Sec. 1961. It is interesting to note that this theory is expressed by Trotter in his work on the effect of war on contracts. *Trotter,* 4th Ed. *"Law of Contracts During and After War",* p. 129.

So far as the respondents were concerned, they had their oil—oil which has since been sold in a profitable market—as well as their vessel which they likewise have since sold under favorable conditions. That the owners did not have

the money with which to pay the seamen their wages is not a legal excuse for failure to perform their contract in this respect; this being a subjective reason for non-performance that has never availed as a defense to contractual performance. *Heyward* v. *Goldsmith,* 269 Fed. 946, 949 (C. C. A. 3rd, 1921); *Gerber* v. *Spencer,* 278 Fed. 886, 890 (C. C. A. 9th, 1922); *Ingham Lumber Co.* v. *Ingersoll & Co.,* 125 S. W. (Ark. 1910), 139, 141-142; *Western Drug, etc. Co.* v. *Board of Administration,* 106 Kan. 256, 263, 12 A. L. R. (1920), 1074, 1079; *Sliosberg* v. *N. Y. Life,* 244 N. Y. 482, 498 (1927); *Williston on Contracts,* Revised Ed., Vol. 6, Sec. 1932.

POINT C.

The respondents are bound by their admission of liability, and are estopped to deny petitioners' claim for wages beyond May 15, 1940.

As appears from the statement of facts, the respondents, on or about July 15, 1940, submitted an affidavit to the Court, in opposition to the petitioners' application for an advance, in which they stated (306):

> "In the meantime, the libelants are still on the payroll and their wages are still accruing. * * *"

In the same affidavit, and in connection with the same statement, they also stated that the reason the seamen had not been paid, was because the respondents did not have the money with which to pay. It is respectfully submitted that this clear admission of a continuing liability for the payment of wages, made more than two months after the day of May 15, 1940, at which the District Court

had later terminated the seamen's right to wages, was a binding judicial admission, especially since this affidavit was made by a person not only proctor for, but likewise an officer of, the respondent Western Operating Corporation.

Wigmore on Evidence (3rd Ed.), Vol. 9, Sec. 2590, states, with regard to this type of admission, as follows:

> "The vital feature of a judicial admission is universally conceded to be its *conclusiveness* upon the party making it, *i.e.* the prohibition of any further dispute of the fact by him, and of any use of evidence to disprove or contradict it."

The Federal rule has actually been the same as Wigmore's definition of it. *National Steamship Co.* v. *Tugman,* 143 U. S. 28, 31, 32; *John E. Garman, etc.* v. *U. S.* 34 Ct. Cl. 237, 242; *Oscanyan* v. *Arms Co.,* 103 U. S. 261, 263; *L. P. Larson Co.* v. *William Wrigley, Jr., Co.,* 253 Fed. 914, 918 (C. C. A. 7th) 1918; *Wigmore,* 3rd Ed., Vol. 9., Sec. 2590. It would therefore seem that the seamen have been deprived of at least 2 months' wages that they were entitled to receive, by actual admission of respondents in Court.

It is the contention of the petitioners, however, that not only were the respondents bound by the admission thus made on July 15, 1940, but, because of this admission, as well as because of subsequent conduct of the respondents that is fully implemented by the record, the respondents were estopped to deny the petitioners' claim that wages were continually accruing up to and including the 11th day of October, 1940.

Thus, the record shows that late in August, the master was threatening deductions from pay unless the seamen continued diligent in their obedience to orders (871-874).

And the record further shows that on September 1, the chief mate ordered that *no more work* be done, clearly indicating, as indeed all indications are, that up to that time the seamen had been receiving orders with the understanding that they would be paid for the work performed pursuant to these orders. The giving of such orders and the reliance by the seamen upon the conduct of the respondents, should clearly have worked an estoppel that should prevent the respondents from denying their obligation to pay wages at least for a reasonable time after the 1st day of September, 1940, when they ordered the cessation of further work. *Williston on Contracts* (Revised Ed.), Vol. 5, Sec. 1508.

POINT D.

The petitioners did not lose their right to repatriation by shipping foreign, but, at the worst, their right to repatriation was suspended during the war.

The contract provision in this respect was as follows (447):

> "2. The employed may be signed off at any place whatever, according to the wishes of the company. In case of signing off the employed is entitled to a free passage and wages until he reaches the place of signing on.
>
> "3. If the employed wishes himself to be signed off at a place outside the place of signing on and this is agreed to, his wages are stopped and repatriation expenses will not be paid."

By stipulation, dated July 11, 1940, counsel for the parties made the following agreement (325-329):

> "That all members of the crew of the 'Ulysses' * * * who have signed off since June 12, 1940, or who at any time hereafter signed off the articles of said vessel for the purpose of becoming members of the crew of other vessels or otherwise leave the country, do so without prejudice to all manner of claims for wages, overtime, bonuses of all kinds, wintering wages, and/or damages referred to in the libel herein as it now stands, or any amendment thereto or further libel, * * *."

The effect of the decisions of the District and Circuit Courts below deny repatriation to any seaman who did not leave the United States on a voyage bound for Norway. That most of the 250 seamen were unable to undertake any such voyage, was clearly evident at the time of the decree. Transportation facilities between the United States and Norway had become practically non-existant, by reason of Germany's invasion of Norway.

The Circuit Court denied repatriation to those seamen who shipped foreign, stating that it was giving effect to Section 3 of the contract referred to above. However, Section 3 obviously was intended to deny repatriation to a seaman who insisted upon a discharge in a foreign port where the owners were returning the vessel to Norway. It obviously has no application to a situation where the vessel was not being returned to Norway. This third section of the contract also obviously contemplated a voluntary request by the seaman to leave the vessel before its return to Norway, where the owners would want a seaman to remain on the vessel until the return to Norway. This was not the case herein; so that, under all the circumstances in the instant case, Section 2 of the contract should have been applied with reference to repatriation.

Further, the seamen were, for the most part, forbidden by our immigration laws to await, in the United States, the termination of the war, before undertaking the voyage to Norway. As the court knows, foreign seamen are permitted only a short period of shore leave, within which time they must procure themselves another vessel going foreign (Title 8 U. S. C. A., Sec. 168). Thus, the laws of the United States effectively precluded the seamen from repatriating themselves at the time of the decree, and the decision precluded those, who, in obedience to the laws of the United States, should ship out, from securing at any later time the repatriation that contract rights had vested for them.

It will further be remembered that the decree occurred approximately 6 months after the filing of the libel, and after many of the seamen had already "shipped out", in the belief that their right to return and claim their repatriation had been secured for them by the stipulation between counsel, which has been quoted above.

No effective reason was stated by either the District Court or the Circuit Court as to why the act of continuing their vocation as merchant seamen during a period in which disordered world conditions prevented their return home, should deprive them of their right to ultimate repatriation when the war should cease.

Indeed, this holding is likewise contrary to the manner in which wars have generally been held to operate on contract rights, so as to cause suspension for the duration of the war. *Williston on Contracts* (Revised Ed.), Vol. 6, p. 1958.

Therefore, it would appear that the very least that should have been provided by the District Court and the

Circuit Court should have been a declaration of the suspension of the seamen's right to repatriation during the war, a right which they could claim upon the war's termination. In the alternative, a reasonable decision would seem to have been one that would have fixed the monetary value of the repatriation which the seamen would receive at the time of the decree, and have awarded that in lieu of the repatriation itself.

POINT E.

The opinions below are contrary to, and in conflict with, prior Federal and State Court decisions and are of serious consequence to the maritime world at the present time.

As must already have appeared, it is the contention of the petitioners that the holdings of the Circuit and District Courts are in many respects seriously violative of seamen's rights as they have been known to exist since ealiest times.* In many respects, as has been pointed out, these decisions openly contradict many well established holdings of Federal and State Courts and unsettle otherwise settled law in respects that we deem worthy of the consideration of this Court.

Particularly are these questions worthy of review under the present world conditions. It is common knowledge that the mortality among seamen in the vessels of the United Nations have far exceeded the rate of mortality of the armed forces of the United States and many other

---

* Payment of wages until discharge (see pp. 20-21). Provisions of written contract (see p. 19). Repatriation (see p. 9).

nations. These seamen have done their duty nobly and well.

Decisions, under these circumstances, which deprive seamen of rights as they have always known them to have existed, and which, in effect, increase the already discouraging hazards of their vocation, should not be encouraged at this time. In this light, a review of the matters herein discussed, by this August Court, may well be considered a contribution to the effort of the United Nations.

Respectfully submitted,

LYMAN STANSKY,
Proctor for Petitioners.

HERBERT LEBOVICI,
Proctor for Petitioners.

Appendix of Foreign Statutes

Denmark (reprinted from International Labor Office, Leg. Series, Den-2, p. 3):

> "18. Wages shall be due on and from the day on which the seaman begins his service on board, or, if he has to make a journey from the place of engagement in order to reach the vessel, on and from the day on which such journey begins.
>
> "Wages shall be due to and including the day on which the employment ceases, or, if the crew is paid off, *to and including the paying-off day,* unless the seaman's right to wages has ceased earlier owing to sickness or some other reason." (Italics ours.)

England (reprinted from Laws of England, Vol. 26, Shipping & Navigation, Part 3, p. 47, Act of 1880):

> "Section 73 * * *. Should wages not be paid in accordance with these provisions, then, unless the delay be due to the act or the fault of the seaman or to any reasonable dispute as to liability or to any other cause not being the wrongful act or default of the owner or master, *the seamen's wages continue to run and be payable until the final settlement thereof.*" (Italics ours.)

Finland (reprinted from International Labor Office, Leg. Series, Fin-1, p. 4):

> "18. In addition to their wages, the crew shall receive free rations, unless the agreement contains any stipulation to the contrary.
>
> "Wages shall be due on and from the day on which the seaman begins his work on board, or, if he has to make a journey from the place of engagement in

order to reach the vessel, on and from the day on which the journey begins.

"Wages shall be due to and including the day on which he leaves his employment, or, if the crew is paid off, *to and including the paying-off day,* unless his right to wages has ceased earlier under the provisions of this chapter. (Italics ours.)

Norway (reprinted from Collection of Norwegian Laws &c., published for use of the Legations and Consulates, p. 315):

"Sec. 18. The seaman's right to wages shall be taken to begin on the day on which he commences the service on board. If he has to travel from the place of engagement, the wages shall, if nothing otherwise has been agreed upon, begin on the day on which such voyage or journey was commenced.

"The seaman shall be entitled to wages up to the day of the termination of the service, or, when he is discharged before an Enrolment Officer or a Consul, *up to the date of discharge.* (Italics ours.)

Panama (reprinted from Consular Tariff Decree No. 71, of 1927, Article 1222):

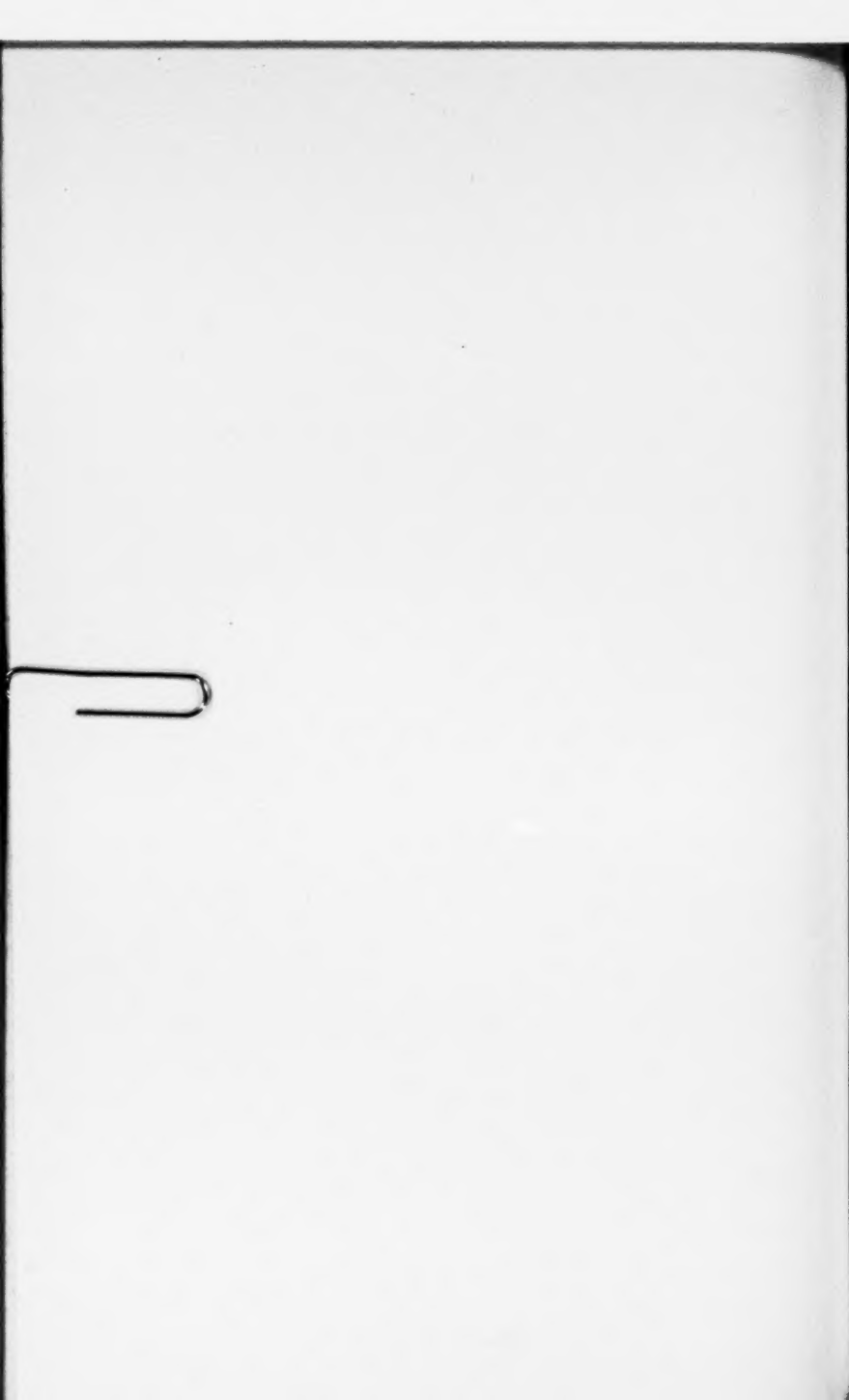
"Article 1222. Should a master dismiss any of his officers or seamen on lawful grounds, he shall pay them their dues according to agreement up to the day of their dismissal, computed on the basis of the distance travelled."

Sweden (reprinted from Merchant Seamen's Law, reprinted from Statute Book of Legations and Consulates, p. 265):

"Art. 18. The wages begin to run on the day on which the seaman enters on his service on board or,

if he must make a journey from the place of engagement in order to join the vessel, on the day on which that journey begins.

"The wages run to and inclusive of the day on which he leaves his service *or, in case of discharge, to and inclusive of the day of that formality,* unless his right to wages has previously ceased in consequence of some provision in this Chapter." (Italics ours.)



No. 386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

OLUF BORUP, et al., seamen on board the American Whale Factory Ship "ULYSSES,"

Petitioners,

against

American Whale Factory Ship "ULYSSES," her engines, boilers, tackle, apparel, furniture, etc., and WESTERN OPERATING CORPORATION, Owner, and H. M. MIKKELSEN, Master,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH K. INNESS,
Proctor for Respondents.

THOMAS J. BLAKE,
Proctor for Respondents.

CORPORATE PRESS, INC., NEW YORK CITY

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I.

Opinions Below.

The opinion in the District Court, not officially reported, is printed in pages 310-327 of the record (928-981). The opinion of the Circuit Court of Appeals, dated July 31, 1942, is reported in Fed. 2nd and is attached to the record certified by the Circuit Court to this Court.

II.

Jurisdiction.

The petition fails to bring itself within the provisions of Section 240 (a) of the Judicial Code as amended 28 U. S. C. A. 347 (a) in the light of Rule 38 of this Court.

It fails to establish any conflict between the instant decision and those of this Court or of any other Circuit Court of Appeals or to demonstrate that it invokes an important question of public interest or local law.

III.

Statement.

The 250 petitioners, mainly Norwegians, were, during the Antarctic whaling season of 1939-40, members of the crew of the American Whale Factory Ship *Ulysses,* which vessel was owned and operated by the respondent Western Operating Corporation, a Delaware corporation, with offices in New York City.

Petitioners signed articles before an American Consular Officer at Sandefjord, Norway, in September, 1939, and, in addition, signed contracts of hire (37-44) incorporating by reference two other agreements, one dated September 12, 1939 (94-103) and the other September 13, 1939 (46-93). The articles provided (39)

"The engagement is:

(a) for the ship's voyage from Sandefjord on a whaling trip to the Antarctic and thence to Sandefjord or port of discharge.
(b) for a period of one season.
(c) until signing off, which can only take place at Sandefjord."

The "arbitral award" provided (81-82):

Par. 8

"2. The crew member may be discharged wherever the Company should so desire. In case of discharge, the crew-member can claim free travel and full pay to the place of signing on."

"3. If the crew-member himself desires to be signed off at a place other than the place of signing on, and this is granted, his wages shall then cease and travel expenses home disallowed."

The *Ulysses* left Sandefjord, Norway, on October 7, 1939 and proceeded toward the whaling grounds. In entering St. Helena Bay for the purpose of refueling its whale catcher boats, the *Ulysses* (452) struck a then uncharted pinnacle rock and sustained damage to her hull, necessitating a trip to Durban on the east coast of Africa for repairs (453). The necessity of making said repairs delayed the vessel so that she was unable to start whale hunting until December 29, 1939 (416), the season having opened on December 8, 1939 (417).

After the close of the season on March 7, 1940, the *Ulysses* was proceeding to Norway to discharge her crew when the invasion of that country by Germany took place. Under the President's Proclamation of April 10, 1940, the *Ulysses* was unable to proceed to Norway (461) and the Master was ordered by the owner to proceed to New Orleans where she arrived on April 26, 1940 and discharged her cargo, following the procedure of the English and Norwegian expeditions.

While at New Orleans and on April 27th, 1940, the Master was served with an order of the U. S. Department of Labor, Immigration Bureau (419), requiring the detention of the libellants on board in any port of the United States.

The vessel then proceeded to New York for repairs where the Master was again served with a detention order of the Immigration Bureau (464). Efforts were made by respondents with the United States authorities to have the petitioners transferred ashore to be maintained at its expense at Ellis Island, The Seamen's Church Institute, or at a hotel but all requests were refused (419). Later an arrangement was made with the authorities to allow one-half of the crew to go ashore every twenty-four hours in the custody of the Norwegian Consul, but none were allowed ashore for longer than twenty-four hours except

for the purpose of shipping aboard a foreign vessel (419-420).

Simultaneously with the arrival of the vessel in New York about May 10, 1940, the men were advised to take jobs on other vessels (631, 774). As a result, approximately ninety members of the crew signed off to serve on foreign vessels. The remainder of the crew remained aboard the vessel and (with the exception of the engine room and victualling personnel) performed no duties pertaining to a whaling voyage and none exceeding in value the maintenance which they received aboard (471-472). The services were such as were necessary only for disciplinary purposes. It was found that what little work was done was for disciplinary purposes only and it was after the hearing of the exceptions to the libel before the Court and after listening to the learned Judge as to a settlement (930) that the Chief Mate told the crew not to render further services of any kind (473).

The owner decided that whaling was no longer profitable for American companies in view of war conditions abroad and the enormous duties on whale oil at home and on June 29, 1940, the vessel was placed in Robbins Dry Dock for the purpose of converting her into an oil tanker (421). Petitioners had notice of the intended conversion as early as May 22, 1940 (717-719). The libel in this action was filed on July 1, 1940 (19).

Petitioners' compensation consisted of basic wages, a share in the oil taken, overtime, war risk bonus while the vessel was in certain areas and a "sliding scale" bonus based on the average sale price of 80% of all oil taken on Norwegian expeditions for the 1939-40 season.

Petitioners were paid a half month's wages at New Orleans and a total of $90 per man before the final decree herein. To such of the petitioners who made a request, ap-

pellees made advances for clothing aggregating $2,500 (306). Respondents also bore the cost of the petitioners' maintenance until they left the vessel pursuant to the District Court's decree on January 11, 1941.

The lower court found in favor of the petitioners for basic wages earned to the end of the voyage (May 15, 1940) and six weeks wages to cover the time necessary to return home; and sliding scale bonus (all of which respondents admitted were due).

Petitioners' additional claims for wages beyond the end of the voyage, additional wages for "over-wintering" and for additional war bonus were rejected. In regard to expenses for repatriating petitioners, the lower Court held that all petitioners who did not ship foreign on other vessels would be entitled to this amount also which was in conformance with the contracts of hire.

Petitioners also sued in the alternative Third Cause of Action for damages alleged to have been sustained by the delay in starting the hunting season, claiming that the accident was *force majeure* requiring additional payments under the contract or was caused by respondents' negligence and that damages were payable to petitioners under the law of negligence.

The lower Courts found that the accident was neither *force majeure* within the meaning of the contract nor negligence and that petitioners had no cause of action (1066-1067, C. C. A. Opinion, fol. 406).

Petitioners also sued on a Fourth Cause of Action for alleged damages caused them by the action of respondents in deciding to withdraw from the whaling business. This has been abandoned (998).

The claims of petitioners in the Third and Fourth Causes of Action aggregated $300,000 and their claims for penalties under the United States Statutes amounted to $50,000.

They could have received their wages and bonuses actually earned and which respondents admitted to be due but they refused to accept same and sign off unless the above claims were paid (801-803) which position was found by the Commissioner and the District Court to be wholly unfair and unreasonable (476, 1053).

Petitioners have now abandoned their claims for penalties under the United States Statutes as well as their claims under the Fourth Cause of Action. No reference is made on this application to the claims under the Third Cause of Action so that this too seems to have been abandoned.

The libel, *in rem* and *in personam,* was filed July 1, 1940 (34) but, there being no court for trials, exceptions to the libel and amended libel were filed and various hearings held and motions made but the petitioners could not be satisfied (although the Court tried to effect a settlement) (930) for anything less than petitioners' full demands. It was not until a Special Commissioner was appointed that the cause could be tried. The Special Commissioner's report was filed on October 11, 1942.

The two main questions raised upon this application, then, are whether the courts below were correct in finding that wages ceased to accrue on May 15, 1940 and that petitioners who took service on other vessels lost their rights to repatriation.

IV.

Proceedings Below.

The Special Commissioner found that the whaling voyage had ended through no fault of either party by operation of law on or about May 15, 1940 (461-462). That the Presidential Proclamation of Neutrality of April 10,

1940 had frustrated the voyage so as to terminate effectively the running of wages beyond May 15, 1940 and further found that no wages were earned by crew members beyond that date (461-463).

The District Court affirmed the findings of the Special Commissioner in all respects pertinent to the petition to this Court (948, 951-952).

The Circuit Court of Appeals also confirmed the findings below in all respects (Opinion, C. C. A., p. 400).

The Special Commissioner, the District Court and the Circuit Court of Appeals all found that, according to the specific terms of the contract of employment, any member of the crew who shipped aboard another vessel thereby waived his right to repatriation (1042—Opinion, C. C. A. 403).

V.

Argument.

Summary of Argument.

Point A. A seaman's contract may be terminated and further performance thereunder excused by circumstances other than a formal discharge and the holding of the Courts below that the frustration of the voyage herein was such a proper circumstance is correct.

Point B. The Neutrality Proclamation of April 10, 1940 frustrated the adventure so as to deny petitioner's claim for basic wages beyond May 15, 1940 and no alternative method, possible of performance, of effecting a discharge existed after the arrival of the vessel at New York.

Point C. The "admission" of liability of July 15, 1940, constituted, at its strongest, an estoppel insufficient to revive affirmatively a contract which had expired by operation of law on May 15, 1940.

Point D. The petitioners who took service aboard other vessels thereby lost their rights to repatriation.

Point E. The opinions below are in accord with prior Federal and State Court decisions and raise no question of national or local importance and are in accord with the decisions of this Court.

POINT A.

A seaman's contract may be terminated and further performance thereunder excused by other means than by formal discharge and the holding of the Courts below that the frustration of the voyage herein was such a proper circumstance was correct.

Point A. Contracts may be terminated and further performance excused in many ways other than by performance or mutual consent. To insist that the petitioners were entitled by their contract to a discharge can have no weight if it be found that intervening circumstances excused performance of said contract in that respect. Such a finding has been made by the Courts below. That the intervening circumstances were sufficient is considered and established in Point B, *infra.*

Further performance may be excused by (1) a fortuitous event interfering with performance. *Lorillard* v. *Clyde,* 142 N. Y. 456; *Buffalo & L. Land Co.* v. *Bellevue L. & I. Co.,* 165 N. Y. 247; *The Kronprinzessin Cecilie,* 244 U. S. 12. (2) by act or operation of law. *Allanwilde Transport Corp.* v. *Vacuum Oil Co.,* 248 U. S. 377; *Omnia Commercial Corp.* v. *U. S.,* 261 U. S. 502; *Mawhinney* v. *Millbrook Woolen Mills,* 15 A. L. R. 1512 and (3) by act of a party. *Charles L. Baylis,* 25 Fed. 862.

On the point of the frustration of the voyage (thus the impossibility of performance of petitioners' contract) the

Courts below have found such impossibility sufficient to warrant a termination of the contract by act and operation of law (1038—Opinion, C. C. A. 400).

Petitioners maintain that, so far as seamens' contracts are concerned, the rules governing the termination of contracts do not apply and that only a discharge may effectuate a cessation of the running of wages.

The authorities cited by petitioners do not support such a position but rather refute it.

The laws of the United States cited (Title 46, U. S. C. A., Sections 596, 597, 641-646) do not apply at all to petitioners who were members of the crew of a whaling vessel, by the express provisions of Title 46, U. S. C. A. 544 which states that the sections cited do not apply to whaling vessels. Moreover, were they to have any pertinence as an expression (as petitioners insist) of legislative intent, we need only refer to another section of Title 46, Section 593, to perceive that it is not intended that a discharge be necessary in all cases but that wages shall be paid, in proper circumstances, only up to a reasonable point without relation to a formal discharge. Title 46, U. S. C. A. 593 is as follows:

> "In cases where the service of any seamen terminates before the period contemplated in the agreement, by reason of wreck or loss of the vessel, such seamen shall be entitled to wages for the time of service prior to such termination, but not for any further period."

As to the Statutes of Foreign Nations cited as evidence of the General Maritime Law, each of those cited by petitioners by its very terms excludes the necessity of a formal discharge in all cases. It would be redundant to review each of the statutes cited since the above is true of all so respondents will consider only the first cited on page 31 of the petition, the Danish statute provides:

> "Wages shall be due to and including the day on which the employment ceases or, if the crew is paid off, to and including the paying-off day, *unless the seaman's right to wages has ceased earlier owing to sickness or some other reason.*"

The decisions cited by petitioners are not in conflict with the decision of the Circuit Court of Appeals herein and do not support the absolute right of seamen to a discharge in all cases.

In *Brown* v. *Lull,* Fed. Cas. 2018, Judge STORY stated the principle to be without doubt that the capture of a neutral ship does not operate as a dissolution of a mariner's contract but only as a suspension thereof. But he does state unequivocally that a sale of the vessel in condemnation dissolves the contract

> "and the seamen are *discharged* from any further duty on board."

A perfect example of the termination of a seaman's contract by a fortuitous event interfering with performance.

Tarleton v. *Mallory,* Fed. Cas. 13,753 also presents with approval the proposition that termination of a maritime contract of hire by operation of law (this time by loss or wreck of the vessel) has long been known in admiralty. While the court there awarded the crew extra wages for the time spent in attempting to save the vessel after stranding, on the master's orders, until she was finally abandoned, it stated that it has long been the rule of general maritime law that the loss of the vessel terminates the crew's service. Here, again, not by discharge but by operation of law.

The other two American cases cited by petitioners have no relation on the facts to the instant case and neither state that discharge is a *sine qua non* to the termination

of wages. Moreover, both are based upon Title 46, U. S. C. A. 596 which, by virtue of Section 544 of that Title, does not apply to the whaling vessels and their crews.

Lastly, petitioners' own petition (p. 4) states that

> "In fact, the petitioners were never discharged by the respondents, but, inasmuch as the petitioners arrested the vessel pursuant to process in rem on October 11, 1940, it will be conceded for the purposes of this appeal, that the right to wages terminated as of October 11, 1940."

A perfect example of termination by act of a party.

Petitioners have not only failed to establish that the general rules of law relating to the termination of contracts do not apply to seamen's contracts but by the authorities cited and their own concessions established that seamen's contracts may be terminated by Act of the party, fortuitous event interfering with performance, and by Act and operation of law.

2. As a curious addendum to their point petitioners have advanced the theory that impossibility of performance, where established, merely gives the master or the owner the right to discharge. No authority is advanced for this startling statement other than the submission that it has never been previously held that frustration or impossibility warranted the cessation of future wages. Since petitioners have not attempted to sustain such a statement other than by citing two cases which do not support it, respondents will only refer the Court to one of those cases, *Tarleton* v. *Mallory, supra,* which cited in its opinion *The M. M. Caleb,* Fed. Cas. 9,682, where the vessel was lost (and the voyage most certainly frustrated) and said.

> "That necessarily *terminated* the service of the seamen."

POINT B.

The Neutrality Proclamation of April 10, 1940 (4 Fed. Reg. 1939), frustrated the adventure as to deny petitioners' claim for wages beyond May 15, 1940 and no alternative method (possible of performance) of effecting a discharge existed after the arrival of the vessel at New York.

The Circuit Court found and the petitioners now seem to agree that the provisions of the contract requiring that the men be signed off at Sandefjord, Norway, was frustrated by the Presidental Proclamation of April 10, 1940 (Opinion, C. C. A. 403).

The petitioners now argue, however, that the alternative option of the respondents to discharge the men elsewhere, simultaneously with the frustration of the promise to sign off the men in Norway, became transmuted thereby from a right to a duty to discharge the men at New York.

The law, the petitioners claim, has always been that where one of the alternative methods of performing a contract is frustrated then the performance of the alternative becomes obligatory upon the promisor, even though the alternative be at his option.

The cases cited, including a decision of this Court, do not support such a proposition. They correctly state the law to be that where there are two alternative *promises* by a party to a contract and one becomes impossible to perform then the remaining alternative ceases to be an alternative *promise* and must be performed.

In the instant case, the Circuit Court has found that there was but one promise, i. e., to sign off the men at Norway with the right reserved to send them home from anywhere, and petitioners have now agreed that the per-

formance as to signing off in Norway was impossible. But they argue, nevertheless, that a right reserved in a party can be changed into a duty by the fact that a promise becomes impossible of performance. This has never been the law and the cases cited in its support do not sustain it.

Moreover, were it possible to effect a change in kind and transfer a right into a duty in the manner suggested by petitioners, there would be no change in the result here. The alternative suggested by petitioners was as effectively frustrated as was the original promise.

At New Orleans and at New York the Master was served with orders of the United States Immigration Bureau detaining the crew on board and in addition the discharge of this crew of aliens were forbidden by the terms of a statute of the United States (Title 8, United States Code, Section 168):

> "Paying off or discharging excluded aliens employed on vessels; landing to allow reshipping.
>
> It shall be unlawful to pay off or discharge any alien employed on board any vessel arriving in the United States from any foreign port or place, unless duly admitted pursuant to the laws and treaties of the United States regulating the immigration of aliens. In case any such alien intends to reship on board any other vessel bound to any foreign port or place, he shall be allowed to land for the purpose of so reshipping, under such regulations as the Secretary of Labor may prescribe to prevent aliens not admissible under any law, convention, or treaty from remaining permanently in the United States, and may be paid off, discharged and permitted to remove his effects, anything in such laws or treaties or in this subchapter to the contrary notwithstanding, provided due notice of such proposed action be given by the master or the seaman himself to the principal immigration officer in charge at the port of arrival."

The Special Commissioner found and the District Court affirmed the finding that the petitioners were required to live aboard the vessel by order of the United States Immigration authorities (953) and that

> "Libelants claim that until they are repatriated to Norway they are entitled to their base wages. It was no fault of the ship that the men were not permitted to land or that they could not obtain transportation to Norway. The shipowner tried in every was to persuade the government officials to permit the crew to land and the shipowner was ready to pay for their transportation to Norway if the men could secure it. War conditions and official orders made it impossible to carry through the contract of employment as originally contemplated. The crew knew this as well as the owner."

and further (956-957):

> "As a further part of libelants claim in the first cause of action they ask that respondent pay them penalties of two days for one, for every day of delay in the payment of their wages. In view of the extent and nature of the claims I believe the respondent was 'morally justified' in not paying the basic wage."

Therefore, not only was it impossible for respondents to pay off in Norway, but they could not discharge and pay off the crew here unless its members were willing to sign off for the purpose of shipping on a foreign vessel. So that, whether it was a right or a duty for respondents to discharge the petitioners here, it was impossible for them to do so without the consent of petitioners, whose demands were of such a nature to warrant a finding (to be given the greatest of weight by virtue of Admiralty Rule 43½) that respondents were "morally justified" in not doing so.

Although petitioners claim that this point was unanticipated and unbriefed below, respondents most cer-

tainly did brief the point and the impossibility of discharge here was denied by petitioners on the ground that the men were finally put ashore by order of the District Court and that, therefore, such an action could not have been illegal. The reason the men were able to go ashore after the decision of the District Court was because the Norwegian Consul agreed to take them into his custody a step which he had previously refused to take until there was some judicial determination of the rights of the parties (933-934).

The reflection in petitioners' brief that the respondents later sold their cargo and their vessel apart from the fact that it is a highly improper statement being made upon events and circumstances outside the record is also as irrelevant as the citation at length of cases distinguishing subjective and objective impossibility in the performance of contracts.

The respondents have never sought to advance their lack of funds as a reason for not discharging the men here. They have maintained and the Courts below have found that the men could not, without their consent, have been discharged here because of the orders of the Immigration Bureau and because of the prohibition of U. S. C. A. 168, that they were "morally justified" in not effecting a discharge on the exorbitant demands of petitioners (957, 1045).

Such an impossibility is patently and irrefutably objective.

POINT C.

The "admission" of liability of July 15, 1940, constituted, at its strongest, an estoppel insufficient to revive affirmatively a contract which had expired by operation of law on May 15, 1940.

Respondent have taken out of its context an isolated statement of counsel and used it as the foundation of a theory which exceeds the bounds of the law of estoppel.

In the same affidavit in which the statement itself appears it is further stated (302):

> "Answering the first demand, there were no wages, share bonus, overtime and war risk bonuses due to the libellants at the time of the filing of the libel, nor are there any such claims now due"

and further

> "* * * but that the premises be worked out between the respondents and the libelants through their proctors at least until the issues raised in the libel have been tried out" (311-312).

Further in explanation we should consider the circumstances surrounding the statement since any alleged admission claimed to create an estoppel is subject to explanation. At the time of the argument of the motion on July 15, 1940 and before and after that date, the respondents never ceased in their efforts to bring about a settlement of the matter but could not get the appellants to budge from their full demands (which, it has been shown were of such a nature that the District Court found that the respondents were morally justified in not meeting them) (1045). So that on July 15, 1940 and up to the time of the hearing before the Special Commissioner the respondents were willing to make some concessions in the matter

of wages if petitioners would relinquish their unreasonable demands (802-803), so that the statement, under all the circumstances, can only be regarded as made in the spirit of compromise. Naturally when petitioners remained obdurate, the parties were relegated to their rights before the Court (930).

Moreover, the absolute maximum force of an admission is that which petitioners claim, it is conclusive upon the parties but not upon the Court.

Certainly, if the Courts below upon proper grounds have found that wages ceased on May 15, 1940, the statement relied upon by petitioners could not revive them.

Moreover, it is respondents' further contention that the filing of the libel in personam on July 1, 1940 was an election to declare the voyage at an end, a point which the Circuit Court found it unnecessary to decide. *Charles L. Baylis,* 25 Fed. 862. If, by their own election, petitioners had terminated their relationship with respondents, were they not, by virtue of the same law of estoppel correctly applied, estopped to deny that the relationship had ended?

POINT D.

The petitioners lost their right to repatriation by shipping foreign.

The petitioners, up to this point, have stoutly maintained that the contract, where possible, be enforced to the fullest. The contract provided

> "3. If the employed wishes himself to be signed off at a place outside the place of signing on and this is agreed to, his wages are stopped and repatriation expenses will not be paid."

The Special Commissioner and the Courts below have given the contract the enforcement which the petitioners have demanded.

Nothing in petitioners brief tends even remotely to establish a reason why the contract should not be followed according to its terms in this respect, other than some lively but unsupported speculation as to what situations this portion of the contract was meant to cover. Such speculation is unwarranted, the contract speaks for itself and the Special Commissioner, the District Court and the Circuit Court of Appeals have been unanimous in their understanding of the meaning of the provision (1042-1043; Opinion C. C. A., fol. 406).

The respondents both below and here strongly resent the reiterated implication of duplicity on their part in petitioners' statements that, after stipulating that the crew would not prejudice its rights to repatriation by signing off, the respondents then changed their position once the men were gone. This is entirely untrue and unwarranted. The stipulation neither specifically nor impliedly reserves the right to repatriation (325-326). In drawing the stipulation set forth at length in petitioners' brief, respondents specifically and categorically refused to sign any stipulation which contained a provision attempting to reserve petitioners' rights contrary to the terms of the contract and the stipulation quoted in petitioners' brief does not mention repatriation nor the reservation of any rights thereto, and no such rights were meant to be reserved by either party.

Moreover, the Courts below are supported by reasons deep-seated in the very idea of repatriation for seamen, i. e., once the seaman enters the employ of another vessel the owner's responsibility to him ends.

The suggestion that the Court should have assessed the amount of repatriation in contradiction to the contract and awarded the amount as liquidated damages is contrary too to the idea of repatriation and unsupported by any authority. *Johnson* v. *Standard Oil Co. of N. J.*, 1940 A. M. C.

1145; *The Prahova,* 38 Fed. Sup. 418; *The Hawaiian,* 33 Fed. Supp. 985, 987.

Petitioners' contention that this interpretation is contrary to the manner in which wars have generally been held to operate on contract rights, so as to cause merely suspension for the duration is best answered by the language of the opinion of this Court in *Allanwilde Transportation Co.* v. *Vacuum Oil Co.,* 248 U. S. 377, 386:

> "The duration was of indefinite extent. Necessarily the embargo would be continued as long as the cause of its imposition, that is, the submarine menace, and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it."

POINT E.

The opinions below are in accord with prior Federal and State Court decisions and raise no question of national or local importance and are in accord with the decisions of this Court.

It has been amply shown that the holdings of the Courts below are in accord with the law with regard to the payment of seamen's wages, their contracts of hire and repatriation. Petitioners have failed to show even one instance of where said holdings are in contradiction of any decisions of any Federal or State Court and have failed to substantiate any sound basis for the necessity of the review of said holding by this Court.

Respondents agree wholeheartedly with petitioners in their regard for the splendid work the seamen of the United

Nations have been doing in furtherance of the war effort. But in view of the fact that petitioners here have failed utterly to establish error in the decisions of the Courts below, respondents cannot perceive how a review of said decisions by this Court will speed victory for our cause.

Respectfully submitted,

JOSEPH K. INNESS,
Proctor for Respondents.

THOMAS J. BLAKE,
Proctor for Respondents.

No. 386

Supreme Court of the United States

OCTOBER TERM, 1942

OLUF BORUP, *et al.*, seamen on board the American Whale Factory Ship "ULYSSES",

Petitioners,

against

American Whale Factory Ship "ULYSSES", her engines, boilers, tackle, apparel, furniture, etc., and WESTERN OPERATING CORPORATION, Owner, and H. M. MIKKELSEN, Master,

Respondents.

REPLY BRIEF

LYMAN STANSKY,
Proctor for Petitioners.

HERBERT LEBOVICI,
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REPLY BRIEF

This brief is submitted solely in reply to respondents' Point B, commencing on page 12 of the respondents' brief, submitted in opposition to the petition for a writ of certiorari.

This Point B seeks to establish that no alternative method of performance existed.

It is the purpose of this memorandum to take issue with this contention which was not adverted to in our main brief.

At the outset, it should be noted that the petitioners did not concede, as it might be supposed from the first sentence of respondents' Point B, that performance of the contract of employment, as written, was frustrated by the Presiden-

tial Proclamation. At best, it is our contention that performance of one alternative may have been frustrated, leaving one or more possible methods of performance available to the respondents.

The respondents contend here that they could not discharge the seamen in New York or in the United States, because of the provisions of Title 8, U. S. C. A., Section 168, quoted by them on page 13 of their brief. Before disputing this contention, it may be noted that neither the District Court nor the Circuit Court accepted the respondents' argument that the respondents were precluded by Section 168 from paying the seamen or from discharging them here. On the contrary, the finding of the District Court, with respect to the notices of detention served upon the Master by the Immigration Authorities, was as follows (1046)*:

> "These notices (of detainer) duplicated notices which had been given to the master by the Immigration Service April 27 at New Orleans. *They did not alter the rights or obligations of libelants or respondents under the September 1939 contracts.*" (Italics ours.)

Furthermore, it may be pointed out that the final decree of the District Court itself provided (1084):

> "* * * all libelants shall pack up and leave said vessel."

In adverting to this statement of the District Court, respondents make a statement, not entirely supported by

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* References are to folios of the printed record.

the record, as to why they were ordered discharged by the decree, but possibly could not have been discharged prior thereto.

However, it must be noted by the Court that the men could either be discharged or they could not. There is nothing in the record to indicate any change of legal circumstance, which would not have permitted the men to be discharged prior to the decree, and that permitted them to be discharged after the decree of the District Court. What would have been illegal before, could obviously not have been made otherwise by the Court.

With respect to the alleged restrictions which, it is claimed, Title 8, U. S. C. A., Section 168, laid upon the respondents, it is important to note that there is nothing therein contained, as there is nothing elsewhere, *that prevents an employer from indicating clearly and unequivocally to the employee that the relationship of employer and employee is severed (discharge) as of any specific date and which prevents the payment to the employee of that which is due.* The section merely prevents a steamship company from *landing ashore* (the statute says "paying *off*") such a seaman, and from thereafter disclaiming such responsibility for him as is imposed by the Immigration laws of the United States. It may be that by virtue of the provisions of Section 168, the employer, after having terminated the relationship and after having paid the employee, might be required to retain him on board. This, however, would not constitute the frustration or impossibility of performance of that provision of the petitioners' contract, which provides (Libelants' Exhibit II, 56; see also 443 and 1018):

> "1. Wages run from and including the day of entering the service until discharge occurs;"

Furthermore, it may be noted that rule 7, sub-division H, paragraph 3, of the Immigration Rules and Regulations of January 1, 1930, then in effect—regulations made pursuant to the provisions of the statute—provided as follows:

> "Alien seamen ordered detained on board or deported pursuant to Section 20(a) of the Immigration Act of 1924 shall not be removed to immigration stations or other places for safekeeping, except in cases of emergency, and in such cases only when the master, agent, owner, charterer, or consignee of the vessel involved shall give satisfactory guaranty that all costs of such removal, including maintenance charges and damage done by such seamen to the station or place to which removed, including damage to equipment, shall be paid by such master, agent, owner, charterer, or consignee."

Pursuant to the regulation, therefore, even conceding that Section 168 might have prevented in the first instance the separation of the petitioners from the vessel after the service of notices of detainer, a matter which we have already contended was not a bar to the payment of the seamen's wages, it appears that the remedy for taking the seamen off the vessel was available. It is true that the record states that at New York (419) "efforts were made by respondent with United States authorities to have the libelants transferred ashore, to be maintained at its expense at Ellis Island, * * *". But the reason for the fail-

ure of this consummation on respondents' part does not appear. It is not unreasonable to assume, however, that inasmuch as the respondents were admittedly financially unable to make payment to the seamen of their wages at that time (310-315), the refusal of the Ellis Island Authorities to accept these seamen followed upon the respondents' inability to give "satisfactory guaranty that all costs of such removal (to Ellis Island), including maintenance charges and damage done by such seamen to the station or place to which removed, * * *" would be paid by the respondents.

Furthermore, in connection with petitioners' contention that the respondents have shown no legal obstacle to the severance of the master and servant relationship, the Court may also note that the respondents could at any time have tendered the amount they conceded to be due into Court, or to other authorities, such as the United States Shipping Commissioner, and simultaneously therewith, to have advised the seamen that their employment was at an end. Had this been done, the respondents' alleged concern for the consequences flowing from the provisions of Section 168, would have been obviated. Such consequences, if real for any purpose, would then have been the concern of the seamen, the depository and the Immigration Authorities; but the shipowner, the respondent, would have discharged both its obligation for the continuance of wages, as well as any possible liability under Section 168. Certainly, this simple and obvious effectuation of the seamen's discharge could not have been the source of complaint by the Immigration Authorities as long as the seamen were not landed ashore or were turned over to the Immigration Authorities.

Any applicability of Title 8, U. S. C. A., Section 168, follows only upon the assumption that the respondents contemplated the discharge of the seamen but were precluded by the provisions of Section 168; and thus it is claimed by the respondents that the alternative method of performance, that of discharge here, was likewise frustrated. Actually, the discussion becomes unimportant if, as was the case, the respondents did not intend to discharge the seamen because they did not have the money with which to pay them. This latter, however, was the real reason for the failure of the respondents to discharge the petitioners and this adequately appears from a reading of the affidavit of Thomas J. Blake, of July 15, 1940, and submitted to the District Court (300-315). From this affidavit, it clearly appears that the reason that the libelants had not been paid, and thus the reason why they had not been discharged was that the respondents did not then have the funds with which to pay them. Not one word appears in this affidavit as to the restrictions of Section 168 that might prevent the making of payment to the men. There is nothing in folios 957 and 1045, cited in this connection by the respondents, at page 15 of their brief, to justify the conclusion that the courts below had found that the men could not be discharged without their consent, because of the order or prohibitions of the Immigration Authorities and Section 168.

It would appear therefore, that there was nothing in Title 8, U. S. C. A., 168, which in fact or theory prevented respondents from the performance of the petitioners' contract with them; that was, to pay them their wages until

they were discharged. The performance of this obligation was in no manner frustrated and remained entirely possible of performance.

Respectfully submitted,

LYMAN STANSKY,
Proctor for Petitioners.

HERBERT LEBOVICI,
Proctor for Petitioners.